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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 413.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

PENNSYLVANIA GREYHOUND LINES, INC., AND GREYHOUND MANAGEMENT COMPANY,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS.

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This matter is before the Court on a writ of certiorari addressed to the United States Circuit Court of Appeals of the Third Circuit, to review the decree of that Court refusing to enforce, in certain particulars to be later considered, an Order of the National Labor Relations Board.

STATEMENT

As the facts will require presentation in connection with the various subjects hereinafter presented, a statement at this point would entail unnecessary repetition.

ARGUMENT

I.

The National Labor Relations Board Was Lacking in Jurisdiction in the Proceedings Involved in the Instant Case.

A.

The Proceedings Before the Board Were Not Instituted or Carried on by a Real Party in Interest.

In discussing the questions raised under this subdivision it is unnecessary to go into extended discussion of the precise character of the functions exercised by the Labor Board. An examination of the reports submitted to both branches of Congress while the Labor Act was under consideration clearly discloses that the powers intended to be vested in the Labor Board were quasi-judicial.

See:

S. Report No. 573, 74th Cong., 1st Sess.

H. R. Report 1147, 74th Cong., 1st Sess.

It is unnecessary to urge that the powers conferred were strictly judicial.

Compare:

Federal Trade Commission vs. Eastman Kodak Co., 274 U. S. 619.

Texas and Pacific Ry. Co. vs. I. C. C., 162 U. S. 197.

It is well settled that the powers of special administrative boards or commissions created by Congress are strictly limited by the terms of the legislation under which they are created.

It may, we think, be broadly stated without fear of serious

contradiction that any case or controversy before the Labor Board presupposes (1) the existence of a labor dispute; (2) that it be regularly inaugurated by a party or parties affected by such dispute; and (3) that it may not be instituted by the Labor Board on its own initiative. Confirmatory of the facts thus stated, allusion may be made to Senate Report on S. 1958 (74th Cong., 1st Sess.), in which the following broad statement appears:

> "This definition does not mean that the Government could intervene in a 'dispute' between an employer and let us say, a critical college professor; for jurisdiction, under this bill depends upon the charge of an unfair labor practice affecting commerce, and there could be no such practice involving the employer and the college professor" (p. 7).

As respects the Labor Board's power of initiative, it is only necessary to allude to the fact that the bill as originally submitted to Congress extended to the Labor Board the power indicated, in the following language:

> "whenever there is a charge *or the Board shall have reason to believe* that any person has engaged in or is engaging in any such unfair labor practice,"

the Board may issue a complaint, etc.

In the final draft of the bill, as the same was ultimately enacted and approved, the words italicized in the above quotation were eliminated.

We are thus brought to a consideration of the circumstances under which the proceedings in the instant case were inaugurated. From which it clearly appears that the party by whom the original charge was filed was in process of formation and which at the time the charges were filed, as well as the entire period covered by the proceedings be-

fore the Labor Board, was not shown to have had any representative status or authority as far as the real parties in interest (the employees) were concerned. In this connection it should be perhaps added at this point, that the issue was raised by respondent's motion to dismiss, challenging the Board's jurisdiction at the opening of the hearings (R. 61-62), and that it was renewed at the close of the testimony introduced by or on behalf of the Board (R. 326).

Returning to the point from which the above digression was made, the facts disclosed by the record where the subject is covered in extended detail, may be summarized as follows:

The employees (whose rights were assumed to have been involved in the proceedings) were employed by Pennsylvania Greyhound Transit Company (R. 330, 486, 53), a circumstance to be later referred to in the next succeeding subdivision of the present argument. One of such employees applied for a charter from the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America (an affiliate of the American Federation of Labor) (R. 254, 273). The charter was granted for the newly proposed organization designated as Local Number 1063 (R. 254). The charter provided in substance, for a complete executive and administrative organization, including a president, vice-president, a recording secretary, financial secretary and board of directors, etc. (R. 429). It designated the individual applicant as president (R. 288; 260). Following the step last indicated, the facts disclosed that a negligible number of the employees had applied for membership, and paid no dues (R. 288-289). At the time the charge was filed no further steps had been taken to complete the organization. None of the other executive officers or a board of directors had been designated (R. 288-289). The

conditions in this latter regard continued throughout the entire period covered by the hearing.

In these circumstances argument hardly seems required to demonstrate that the organization by which the charge was filed was in a purely embryonic state; that its officers were wholly lacking in authority to inaugurate proceedings on its behalf; and that it was totally lacking in representative status as far as its ostensible members were concerned. Notwithstanding, the precipitous haste with which the Labor Board sought to exercise its jurisdiction, sufficiently appears in the following circumstances. On October 8th, 1935, the Board granted permission to Local Number 1063 to file a charge (R. 5-6). On the same date a charge was filed by counsel in the name and on behalf of Local 1063 (R. 3-5). On October 9th, 1935, the Board issued its complaint (R. 6-10). The complaint was served on respondents on October 10th, 1935. The complaint set the date for hearing at Pittsburgh October 22nd, 1935. On the date last mentioned the hearing was commenced and continued until October 26th, 1935 (R. 59-527).

The Board issued its decision and Order on the 7th day of December, 1935 (R. 16). The same was served on respondents on December 9, 1935, and on December 10, 1935, the Board filed its petition in the office of the Clerk of Court of the United States Circuit Court of Appeals for the Third Circuit, for enforcement of the Board's Order.

It may be reasonably assumed that the procedure followed by the Board arose from its anxiety to bring before the courts a case to determine the constitutionality of the Wagner Act, where the issue of interstate commerce was not involved, but this anxiety cannot excuse the non-observance of fundamental requirements for proceedings of this character. Lacking, what for brevity may be termed a real party

in interest, the Board should have recognized that it was wholly without jurisdiction and have dismissed the proceedings accordingly.

B.

The Relation of Employer and Employee Did Not Exist Between Respondents and the Parties in Whose Ostensible Behalf the Proceedings Were Instituted.

The Board found that the respondents were the employers of the employees, the infringement or violation of whose rights was the subject of the charges embodied in the complaint (R. 6). The facts, briefly stated, were as follows:

The employees in question were employed by Pennsylvania Greyhound Transit Company, an independent corporation which constituted one of the operating subsidiaries of the Greyhound System (R. 53, 330, 486). This operating subsidiary conducted the Pittsburgh garage, leased from respondent Pennsylvania Greyhound Lines, Inc. The controlling interest in the stock of the Transit Company was owned by the last named respondent. Such respondent's sole function as far as operations were concerned was that of a fiscal agent through which the accounts of all the various operating subsidiaries were liquidated (R. 485-486). The respondent Greyhound Management Company's sole functions were related to the supervision of account systems and other technical phases of the affairs of the operating subsidiaries (R. 485, 53). There was no evidence disclosing that respondents controlled the employees of the operating subsidiaries or that any privity of contract existed between such employees and respondents or either thereof. In the circumstances thus indicated, it is clearly apparent that had an employee received actionable injuries in the course of his employment,

his sole right of action would have been against the particular subsidiary by which he was employed.

The operations of the various corporate motor carriers in the Pennsylvania Greyhound Lines System were conducted pursuant to the Federal Motor Carrier Act, 1935. The operating rights, called certificates of public convenience and necessity of these operating corporations were held pursuant to state laws and the Federal Act. The operating activity carried on by a corporation not specifically authorized would be subject to penalty under both Federal Act and the State laws. It was not until December 19, 1936, that the operating rights of the subsidiary companies of respondent Pennsylvania Greyhound Lines, Inc., were transferred and merged pursuant to the Federal Act into that holding company which then became an operating company (see Greyhound Mergers, 1936, Volume 1, Motor Carrier Cases, p. 342, Interstate Commerce Commission Reports).

Respondents raised the question of the absence of the employer and employee relation both in their answer (R. 13-14), and in their motion to dismiss (R. 326). The sole question for consideration was therefore, that of whether the employer and employee relation was essential to the Board's exercise of jurisdiction. The mere statement of the inquiry seemingly suggests the necessary answer particularly in the light of the terms of the Act in question. The existence of that relationship presents therefore, a jurisdictional question on which the findings of the Board were not conclusive.

The precise question was passed upon in the case of *Crowell vs. Benson,* 285 U. S. 22, in which Chief Justice Hughes, in the opinion of the Court stated as follows:

> "What has been said thus far relates to the determination of claims of employees within the purview of the Act. A different question is presented where the deter-

minations of fact are fundamental or 'jurisdictional,' in the sense that their existence is a condition precedent to the operation of the statutory scheme. * * * These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly (Sec. 3), but also because the power of the Congress to enact the legislation turns upon the existence of these conditions."

* * * * * * * * * *

"In the present instance, the Congress has imposed liability without fault only where the relation of master and servant exists in maritime employment and, while we hold that the Congress could do this, the fact of that relation is the pivot of the statute and, in the absence of any other justification, underlies the constitutionality of his enactment. If the person injured was not an employee of the person sought to be held, * * * there is no ground for an assertion that the person against whom the proceeding was directed could constitutionally be subjected, in the absence of fault upon his part, to the liability which the statute creates.

* * * It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend."

II.

The Decision of the Circuit Court of Appeals.

In approaching the terms of the judgment of the court which are here challenged and sought to be reviewed, two questions immediately present themselves, the first of which necessarily turns on the authority of the Labor Board under the Act, and second, on the nature of the jurisdiction conferred on the courts under the Act's terms.

The provisions of the Labor Board's order which are not here in question were of the customary sweeping and drastic character. These were supplemented by what are here referred to as Subdivisions (c) and (d) of paragraph 4 as follows:

> "(c) Withdraw all recognition from the Employees' Association of the Pennsylvania Greyhound Lines, Inc., as representative of their employees, including the employees of the Pennsylvania Greyhound System, for the purpose of dealing with respondents concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work;
>
> (d) Post notices in conspicuous places in all of the places of business wherein their employees, including employees of the Pennsylvania Greyhound System, are engaged, stating that said Association is so disestablished and that respondents will refrain from any such recognition thereof;"

Briefly stated, the circumstances leading up to the mandatory injunction included in these provisions of the order were as follows:

Some three years before the enactment of the Labor Relations Act, an organization of the employees of the various

operating subsidiaries was created. This organization had continued to function from the date of its institution down to the time of the proceedings here in question. The relations between the employers and the members of this organization were made the subject of the stereotyped form of attack resorted to in cases of this character, with the resultant finding by the Board, in substance, that the employees' organization had been promoted by the employers which had rendered financial assistance, etc., and had largely controlled the organization's policies (R. 55-56).

The finding further determined that the employers had interfered with, restrained and coerced their employees in the exercise of their rights under Section 7 of the Act (R. 55).

The subject last mentioned, as well as that involved in the assistance and support rendered the association by the employer, were covered specifically in the "cease and desist" provisions of the Board's order which are not involved in the issues here presented. It may be added at this point that up to the time of the passage of the Labor Relations Act there was no evidence of any substantial dispute or controversy between the employees and their various employers, comprising the system as a whole. There was similarly no evidence of any dissatisfaction on the part of the employees respecting the handling of administrative features confided to the jurisdiction of the representatives of the employees' association. Incidentally, the fact may be mentioned that the employees called as witnesses by the Board in support of the charges made against the ostensible employers, admitted that in all matters submitted to the employees for determination by an election, such election had in all cases been fair and without restraint or coercion on the employers' part (R. 273, 274, 275).

It should further be added and emphasized that as the case was presented and considered by the Labor Board there was no question of collective bargaining involved. The sole charges preferred were made under Section 8 of the Act which embraces the subject of unfair labor practices. No allusion was made, nor was there any reason for such allusion in the proceedings, to Section 9 which embraces the subject of collective bargaining.

There was no evidence that the employer had ever in anywise recognized the employees' organization as the representative of any others than the accredited members of that organization. There was similarly no evidence that anything had been said or done by the employer or any action taken by the latter which could be construed as indicating its intention to extend the representative capacity or status of the employees' organization to that of collective bargaining agent as that characterization is specifically defined in the Act's terms. Nor had any other labor organization approached the employer as a representative of the employees.

In the circumstances thus indicated the question immediately propounds itself as to the authority of the Labor Board under the issues presented, to make any adjudication whatsoever respecting the rights of the employees' organization except in so far as the question of unfair labor practices was concerned. The latter issue was obviously limited *to past actions* and the enjoining of the continuance of *those actions* in the future.

It is broadly asserted by counsel for petitioner that the authority assumed by the Board in prejudging future rights and relations concerning both the rights of employer and employee was indispensable in effectuating the purposes of the Labor Act. Whether any such contention might be sustained under wholly different issues, as for illustration, in

proceedings involving the right of collective bargaining, or where the Board had certified such representative, need not be here considered. The action of the Board on purely anticipatory and hypothetical possibilities under the issues and circumstances here presented clearly exceeded its authority.

It is further contended by petitioner that the authority assumed by the Board in the present instance is expressly provided by Section 10 (c). The section in question covers the subject of hearings before the Board with the authorization of findings and orders requiring the party against whom charges are filed to cease and desist from unfair labor practices, adding the following terms:

> "* * * and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *"

As interpreted by petitioner, there is no limit to the discretionary power conferred by the Board provided that *in its opinion* its action is calculated to carry out the purposes of the Act.

It requires no argument to demonstrate that on any such interpretation the Board's power might be extended to wholly unconstitutional action as in the instant case.

It is next asserted that the decree of the Circuit Court of Appeals in refusing to enforce the provisions of Sections (c) and (d) of paragraph 4 of the Board's order, runs counter to the decisions of this court in *Texas & N. O. R. Co. vs. Brotherhood*, 281 U. S. 548; *Virginia Railway Co. vs. System Federation No. 40*, 300 U. S. 515; and *National Labor Relations Board vs. Jones & Laughlin Steel Corp.*, 301 U. S. 1.

The contention in this respect is wholly untenable if regard be had to the precise issues presented and determined

by the court in the cases mentioned. In this connection, we think it is only necessary to allude to the Texas & N. O. R. Case, the issues in which are too familiar to require more than a summary statement.

The suit was one in equity brought by the Brotherhood for the purpose of compelling its recognition by the Railroad, as representative of the employees for the purposes of collective bargaining. The facts, succinctly stated, disclosed that the Brotherhood had been recognized by the Railroad as such representative. That negotiations had followed incident to which a proposal was submitted for an increase in the scale of wages paid by the Railroad. This last was refused whereupon application was made by the Brotherhood to the Board of Mediation provided under the 1924 Amendment to the Transportation Act. While the subject was under consideration by the Board, the Railroad inaugurated the organization of its employees and by threats and intimidation sought to force such employees to join the organization and refrain from further relationship with the Brotherhood. The bill as filed sought as relief the restoration of the *status quo* to restrain the Railroad from interference with the freedom of its employees in selecting their representative for collective bargaining by threats, intimidation, etc.

A temporary injunction was sought and granted. The terms of this injunction having been violated, proceedings in contempt were instituted resulting in an order determining the charge had been sustained and providing in substance, that to purge itself from the contempt, the Railroad be required to reinstate the Brotherhood as representative of the employees for the purposes of collective bargaining. The issues were ultimately determined on the merits in favor of the Brotherhood, the injunction was made perma-

nent and incorporated with the contempt order in the final decree (25 F. (2d) 873). The latter was carried successively to the Circuit Court of Appeals and thence to this Court where it was considered in the case cited.

It is at least a peculiar coincidence that in the various reviews of this case, detailed examination of the proceedings in the lower court have been omitted. It has been assumed, and this, in reality is the burden of petitioner's argument in the present case, that the injunction order of the court, included in its decree, disestablished what for brevity may be termed the employees' organization and assumed to predetermine the rights of the members of that organization as well as the rights of the employer in dealing with such members. The assertion in this regard is wholly unjustified if reference be made to the decisions and decree of the District Court from which the appeals were taken.

The terms of the original injunction in this case appear in the decision of the Circuit Court of Appeals (33 F. (2d) 13). In its general features the injunction covered the incidents already alluded to but supplemented these by the following important provisions:

> "Nothing in this injunction shall be considered or construed as authority to prevent any employee of said defendant Railroad Company, in the class referred to, from organizing, joining, promoting, or fostering as many unions as he or they (meaning such employees in the class referred to) may desire, and in any way which he or they may desire, and with the assistance and aid of any of his fellow employees in any way and to any extent that said fellow employees (in the class referred to) may desire; * * *"

The language thus quoted seems to have been adroitly if

not disingenuously excluded from the reasoning of the Labor Board in its earlier decisions. The later decisions of the Board have manifested a tendency to recognize independent organizations of the employees not affiliated with any established union. These last require no detailed review.

Returning however, to the Texas Case, allusion should perhaps be made to the contempt proceedings resulting in the order already mentioned. This appears in the report found in 24 F. (2d) 426. Motions were made to vacate the temporary injunction (25 F. (2d) 873), and also to set aside the contempt order (25 F. (2d) 876). The ruling on the last mentioned motion explains and to some extent amplifies the terms of the original injunction. This last will sufficiently appear from the following excerpt of the opinion rendered by the court:

> "In directing the railroad to disestablish the Association of Clerical Employees as it is now constituted *as the recognized representative of the clerical employees* of the railroad company, the court merely restored the status which existed at the time of the granting of the injunction, at which time this association was in the process of formation, its representative character had not been established, and since that association had been formed and promoted by the interference of the defendant company, and its recognition brought about as the effective act in such interference in violation of the injunction, the court properly directed the railroad company not to recognize it as representative as presently constituted and established, *leaving open to the employees the right by secret ballot, or by any other way they desire, uninfluenced by dictation or interference by the defendant company, to select the association, if they chose, as their representative.*" (Italics supplied.)

With respect to the liberty of action of the employees not members of the Brotherhood, the order was further modified as follows:

> "* * * I believe that that provision in the contempt decree, No. 3 thereof, should be modified by adding after 'secret ballot,' or in any other manner decided by themselves, so that that provision of the contempt order will hereafter read: 'Reinstating and re-establishing the said brotherhood as the representative of the clerical employees in all matters relating to their employment by the said railroad company, disputes as to pay, working conditions, etc., substantially as said status was on June 1, 1927, until such time as said clerical employees by a secret ballot taken in accordance with the further directions of this court, *or by any other means of selection* which the employees themselves may decide upon and adopt, and without the dictation or interference of the said Texas & New Orleans Railroad Company, H. M. Lull, G. S. Waid, or J. C. Torian, shall choose another representative or representatives.'" (Italics supplied.)

It is thus apparent that the decision and decree in the case thus referred to and relied upon explicitly, saved and reserved to the members of the employees' organization the very rights which the provisions of the Labor Board's order now in question sought to deny. That these provisions were calculated and intended to drive the independent non-union employees into the sheltering folds of an established union is so far apparent as to exclude the necessity of argument. It is, however, contended by petitioner that it does not rest with the employer to assert the constitutional rights of his employees. The right, however, of dealing between employer and employee is correlative and the inhibition or qualifica-

tion of the rights of one equally infringes the right of the other.

It must not be overlooked in this connection that the broader features of the rights of independent employees and the corresponding right of the employer to deal with such employees is clearly involved in the provisions here sought to be reinstated in the Board's order. If employees refuse to submit their fortunes to an outside organization, involving the submission of their liberty to the arbitrary action of the latter, they are substantially exercising their constitutional rights. If, in this situation, they have the rights begrudgingly reserved to them of submitting their grievances individually, they certainly have the same right to combine and designate their representatives for the accomplishment of the same end. They may not be deemed or characterized as the sole agent for collective bargaining under the Act's terms, but their independent rights remain unaffected, for reasons above stated. They certainly cannot be "disfranchised" by the mere employment of epithets such as that of company unions. Let it be recalled that in both the Texas and Virginia Railway Cases it was explicitly held that the doctrines of the Adair and Coppage Cases were in nowise involved or questioned. If the right to hire and discharge is acknowledged, as thus stated, there is necessarily included the right of determining between the parties concerned, the terms of such hiring and this explicitly if not expressly recognizes the constitutional right of both the employer and employee to the exercise of the liberty of contract.

We need not pause to consider in detail the contention of petitioners in their argument in support of their application for certiorari in this case, to the effect that while the provisions of the order here in question may have been to disestablish the employees' organization, that organization

might be resuscitated by leave of the Board when the latter was satisfied that it was wholly free from the employer's domination (page 10).

We emphatically deny that any organization is required to submit the question of its right of existence to the Labor Board and similarly deny that the employer is bound to refuse to deal with an organization of his employees until permission is accorded by the Board. The Board's jurisdiction under the terms of the Act of its creation is, broadly stated, limited to cases dealing with unfair labor practices. Until its jurisdiction is thus invoked or for the purpose of designating the agent for collective bargaining, nothing in the statute confers any right or jurisdiction upon it or imposes restrictions on the freedom of contract between employers and employees wholly regardless of the Board's consent.

That the Board in the present instance exceeded its jurisdiction and authority in a controversy in which no rights of collective bargaining were involved is evident from the Board's own recitals in the light of the Act. The Board found that "The Association is a labor organization within the meaning of Section 2, subdivision (5)" of the Act (R. 27). Section 7 of the Act insures to the employees the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." The Act further makes it an unfair labor practice for an employer to interfere with the exercise of the rights guaranteed to the employee in Section 7, or "to dominate or interfere with the formation or administration of any labor organization."

Yet notwithstanding the fact, as the Board found, that

the Association was a labor organization, the Order directs that the respondent shall "disestablish" the Association as a labor organization. Not only does the Board require its dissolution as an agency for collective bargaining but prohibits the employees' using the same "for the purpose of dealing with respondents concerning grievances" (R. 58). Even the Act concedes "That any individual employee or a group of employees shall have the right at any time to present grievances to their employer" (Sec. 9 (a)).

Furthermore the prohibitions of Subdivisions (c) and (d) of paragraph 4 of the Board's order is directed not only against the rights of employees of the respondents named but against those of "employees of the Pennsylvania Greyhound System." The System included five operating corporations, of and in as many states, not named as respondents.

The petitioner acknowledges that in so far as respondents have "sponsored, dominated and financially supported" the Employees' Association in violation of Sections 8 (1) and (2) of the Act they have acquiesced in the enforcement of the Board's order "to cease and desist from such practices" (Petitioner's Brief p. 20). That being so, what provision of the statute empowers the Board to take further action against respondents? They were charged only with unfair labor practices under Section 8, subdivision (1), (2) and (3) of the Act (R. 9). They have in a spirit of adjustment of their labor relations to a new law seen fit not to contest in this court the other burdensome provisions of the Board's order, although the record presents serious question as to the legality of the Board's findings. But respondents do protest the legality of that part of the Board's order which it now seeks to re-establish, in the face of the Board's own determination that the Employees' Association

is a labor organization from whose sponsorship, domination and financial support, the respondents have divorced themselves, if they ever exerted any.

It certainly was not in the minds of the members of the committees which handled this legislation in Congress that employees' associations were to be outlawed or that the Board should have any power to "disestablish" them. It was indicated that the restraining influence of the court could intervene if the Board exceeded its powers. The following excerpts are from hearings before the Committee on Labor, U. S. Senate on S 1958, 74th Congress, First Session:

> "The Chairman: I think I can say to you that the committee and yourself are not far apart as to the preservation of company unions that are free from the domination you have reference to and which are not as objectionable as you have mentioned.
>
> "I do not think there is any disposition here to destroy or prevent a legitimate, independent company union from operating and carrying on its collective bargaining relationships with its own employees" (Senate Hearings, Part 3, pp. 341-342).
>
> "The Chairman: As Senator Wagner has said, if your employees' organization is voluntary, free from control or influence or direction by the employers, there is nothing in this proposed legislation to interfere with that; and the Board that is set up would be performing an illegal act if it attempted to declare your organization illegal. That is, my judgment, and it is your judgment, Senator Wagner?
>
> "Senator Wagner: And if the Board is wrong, there is a review in court" (Senate Hearings, Part 3, p. 417).
>
> "The Chairman: But I judge that your fear and that of others is that the Board might in its desire to give

preference to trade unions seek to declare unions or organizations such as you have illegal?

"Mr. Mitchell: Yes.

"The Chairman: I think the committee will, in the drafting of this bill, if it is not already included, make it very clear that the organizations that are free from domination, referring now to employees' organizations, shall not be subjected to any such ruling by the Board that is set up here" (Senate Hearings, Part 3, pp. 417-418).

The second question under the present heading involves the jurisdiction of the Circuit Court of Appeals in dealing with applications to enforce orders of the Labor Board. The argument made on behalf of petitioner apparently ascribes to the court in such cases the limited jurisdiction possessed by courts of error and appeal. If such were the intention of Congress that intention is absent from the Act's terms. The jurisdiction conferred upon the court is found in Section 10 (e) which need not be quoted. In substance, it is provided that upon the pleadings and entire record, the court shall make its order enforcing, modifying or vacating the order sought to be enforced.

The question now presented is seemingly foreclosed by the opinion in Intermountain Rate Cases, 234 U. S. 476, 490-491, in which, in delivering the opinion of the court, Chief Justice White stated as follows:

"It is of course true as pointed out in *Interstate Commerce Commission vs. Illinois Central Railroad,* 215 U. S. 452, 470, and since repeatedly applied that findings of fact made by the Commission within the scope of its administrative duties must be accepted in case of judicial review, but that doctrine, as was also pointed

> out, does not relieve the courts in a proper case from determining whether the Constitution has been violated or whether statutory powers conferred have been transcended or have been exercised in such an arbitrary way as to amount to the exertion of authority not given, doctrines which but express the elementary principle that an investiture of a public body with discretion does not imply the right to abuse but on the contrary carries with it as a necessary incident the command that the limits of a sound discretion be not transcended which by necessary implication carries with it the existence of judicial power to correct wrongs done by such excess."

In the instant case the court was entirely within the limits of its authority in determining that the provisions of the order here in question were both arbitrary and unreasonable and that for these reasons the same should be excluded from the order or decree of enforcement.

The whole thesis of petitioner's argument, which is both extended and involved in matter of detail, may be resolved into comparatively narrow compass. Starting with the assumption that any organization of employees which has been fostered, promoted or aided by the employer and whose operations are assumed to have been dominated by the employer is iniquitous and beyond the pale, the total exclusion of that organization from all recognition or consideration under the Labor Act is essential to effectuating the broad purposes of that Act.

In the accomplishment of the latter objective, it is asserted that the contemplated exclusion is authorized as an incident of the Board's injunctive jurisdiction, characterized in the Act's terms as a cease and desist order. Further

confirmatory of the existence of the Board's power is the provision of Sec. 10 (c) of the Act, authorizing the Board to take such affirmative action as in its opinion is necessary to effectuate the Act's purposes.

It is further asserted that in the absence of the precautionary steps thus suggested, the whole scheme of collective bargaining is jeopardized, if not wholly destroyed.

While somewhat adroitly expressed, the instant case furnishes a typical illustration of exactly what the thesis thus indicated is calculated and intended to demonstrate. In this case, a negligible number of the malcontents amongst the employees sought to inject themselves into the affairs of the business or industry here involved, by, as already stated, obtaining a charter heretofore referred to as Local No. 1063. The ultimate objective, in the light of experience, requires no comment. Standing between these malcontents and the accomplishment of that objective was the previously established organization of the employees. It is self-evident that the injunctive provisions of the Labor Board's order here in question were intended either to force the employees into Local No. 1063 or some other established labor organization.

Much stress is laid in the argument on the subject of "collective bargaining"; that, the order of the Board was addressed to and at the accomplishment of this basic purpose, and should be interpreted accordingly.

This argument, as far as the issues here involved are concerned, wholly overlooks one essential detail, viz: that established labor organizations are not the only ones to whom the contemplated privilege of exercising that right is extended. The employees of any industry have, for reasons heretofore sufficiently discussed, certain rights which the employer is entitled to recognize in the exercise of its

reciprocal constitutional rights and privileges. The Labor Board is not empowered to deny those rights without exceeding its jurisdiction and violating the constitutional provisions under which they arise. The latter is the phase of the instant case which is overlooked in petitioner's extended dissertation relating to the Labor Act's intendment and purpose as well as its interpretation.

Let it be recalled that the particular employees' organization here involved was created before the enactment of the Labor Act. It created certain rights and privileges which were accepted by both employees and employer. It transcended no statute and violated no law. In common with all other contracts and undertakings, its provisions might be modified at any time by mutual consent. The requirement that the employer should practically repudiate that contract, could not annul the agreement or the rights thereunder created or provided. If the Labor Act pronounced that certain acts of the employer contemplated by the arrangement were illegal, it may be argumentatively assumed that the continuation of those acts on the part of the employer might be enjoined and such, in effect, was the result of the cease and desist provisions of the Board's Order, which are not here involved.

Even this assumption, however, does not annul the arrangement in its entirety or exclude the employees from the exercise of rights which were not and are not denied by anything in the Act's terms. Whatever those rights were, need not be here discussed in detail but there was certainly nothing in the Act which denied them the right or privilege of contracting with their employer or could deny such rights without the violation of constitutional inhibitions.

The answer to the latter assertion in petitioner's brief in extended detail, to the effect that the employees might have

intervened in the proceedings under the terms of the Labor Act or appealed from the Labor Board's order as aggrieved parties thereunder, is not germane to the issue. Likewise the assertion that it did not rest with the employer to assert the constitutional rights or immunities of the employees is wholly aside from the question for the very obvious reason already indicated, that the same freedom of right of contract on the part of the employees was shared by the employer. The fallacy in petitioner's argument becomes at once apparent when it is recognized that, without so stating, the case is treated as though the members of Local 1063 were the only parties whose rights should be considered and that the reciprocal constitutional rights between the ostensible employer and the great majority of the employees were to be totally ignored.

Much stress is laid in petitioner's argument on what are termed the antecedents of the present Labor Relations Act. These last include Sec. 7 (a) of the National Industrial Recovery Act and Public Resolution No. 44. The latter need not be considered in detail for the quite obvious reason that they shed no light on the constitutional privileges with which we are here concerned. Let it be recalled in this connection that we are dealing with the rights of employees who are not members of any of the great national labor unions.

The argument of petitioner lays stress on the *Texas & New Orleans* case, *supra,* asserting in substance that the ruling in that case provided the criterion for the Labor Relations Act. In the extended argument respecting this case, it will be observed that petitioner has overlooked the qualifications of the injunctive order in that case which have already been discussed in this brief and need not therefore be repeated. The lesson to be learned from the ruling

of the lower court in that case, which was affirmed, is, that it expressly recognized and granted the very rights and privileges which the order of the Labor Board, in the respects here under consideration, denied.

Notwithstanding that under the holding of the courts in that case, the employees' organization was born in iniquity, the original order of the court, providing for an election by the employees under its (the court's) direction, was modified in such wise that complete freedom of action was restored to the organization's members.

It is tacitly, if not expressly, admitted in petitioner's brief, that the effect of the provisions of the Labor Board's order which the Court of Appeals refused to enforce, was to deny any rights of both the employer or employees to have any dealings whatsoever. We are not here speaking of the rights of an agent designated by the Labor Board as the representative of the employees for the purpose of collective bargaining. That question was not involved in the instant case. Let it be assumed for purposes of argument, that in a given case, no such agent had been certified or designated by the Board. Let it be further assumed that the members of the employees' organization comprising upwards of 90% of all employees were satisfied with existing conditions; that they were willing to exclude all features of the organization's basic agreement which had been found objectionable by the Labor Board and it then presented to the employer an agreement excluding the latter features and covering the usual and ordinary details of the employer-employee relation with the request that it be accepted and approved by the employer. Let it be further assumed that the agreement so submitted incorporated none of the rights ascribed to the agent for collective bargaining under the Labor Act but was strictly limited in its effect to the mem-

bers of the organization by which it was presented. If the argument by petitioner is sustained, it means nothing less than that the employer could not accept and execute the contract presented even though wholly satisfied with its terms.

The situation thus suggested is by no means purely theoretical. It has arisen in actual experience and in certain of its phases, has already been before the courts.

Compare:

National Labor Relations Board vs. Mackay Radio & Telegraph Co. (C. C. A. 9), 92 Fed. (2d) 761;

Jeffery-DeWitt Insulator Co. vs. National Labor Relations Board (C. C. A. 4), 91 Fed. (2d) 134.

Other features of petitioner's argument have, we think, been sufficiently anticipated and covered in the previous subdivisions of the present brief.

III.

The Issues Are Moot.

Through proceedings before the National Labor Relations Board pursuant to Section 9 (c) of the Act the issues herein have become moot. On May 13, 1937, there was filed with Regional Directors of the Board petitions alleging that questions affecting commerce had arisen concerning the representation of employees (bus drivers) of respondent Pennsylvania Greyhound Lines, Inc., and requested the Board to conduct investigations and certify representatives pursuant to Section 9 (c) of the National Labor Relations Act. The Board held hearings upon the petitions to which the Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America, among numerous other labor

unions, was a party. As a result of such proceeding the Board, by its decision of September 14, 1937, certified without the formality of an election and pursuant to alleged power vested in the Board by Section 9 (c) of the Act the Brotherhood of Railroad Trainmen, as a representative of such employees, for the purposes of collective bargaining under the Act (Case No. R-151; 3 NLRB No. 69). Under such certification the respondent, Pennsylvania Greyhound Lines, Inc., has recognized the Brotherhood of Railroad Trainmen as the agency for collective bargaining of its said employees and entered into a contract with that labor organization as representative.

Also on September 21, 1937, there was filed with the National Labor Relations Board a petition by the Committee for Industrial Organization alleging that a question affecting commerce had arisen concerning the representation of the employees of the Pittsburgh Division of the respondent, Pennsylvania Greyhound Lines, Inc., and requesting that the Board certify the representatives of the maintenance employees, porters and ticket agents at that point for collective bargaining purposes. Pursuant to such petition the Board held a hearing at Pittsburgh, Pennsylvania, on November 26, 1937, upon the question of representation under Section 9 (c) of the National Labor Relations Act for such employees. The class of employees named in such petition for which representation was sought was the same class of employees as those ordered reinstated by the Board in the present proceedings and the representative presenting the petition therein for the Committee for Industrial Organization was the same person, Robert J. Davidson, appearing as president of Local Division No. 1063 of the Amalgamated Association filing the petition in the instant proceeding before the Board. Argument upon the hearing held pursuant

to petition of the Committee for Industrial Organization has been set by the Board at Washington on February 4, 1938. Respondent Pennsylvania Greyhound Lines, Inc., is a party to said proceedings and has entered no objection to the determination by the Board of the representative of its said employees for collective bargaining purposes pursuant to the National Labor Relations Act (NLRB case VI-R-50).

The employees' association named in the order of the Board herein was not a party to either of the proceedings referred to in connection with the petitions for representations of the employees of respondent Pennsylvania Greyhound Lines, Inc., pursuant to the National Labor Relations Act.

CONCLUSION

One of the main objectives of the present brief has been to direct the attention of the court to the more practical, as contradistinguished from the purely theoretical, features of the employer-employee relation.

This is a phase wholly evaded or ignored in petitioner's brief. Little progress is made in following the circuitous route adopted in that argument, which, however disguised, in its last analysis comes back to the point that all industry must be unionized and that the power of the National Labor Relations Board is supreme.

As long as the main, if not the whole purpose of the Labor Relations Board, as well as its counsel and administrative subordinates, is addressed to accomplishing the ascendency of labor unions, little progress will be made. As long as the exercise of jurisdiction by the Labor Board proceeds upon the assumption that all members of a labor union are angels while all employers of labor are demons, the outcome

of all issues submitted for its determination leaves little room for doubt.

It is all too frequently asserted that the domination exerted by the employer over the employee is endured by the latter in the fear that he would otherwise, in the vernacular, lose his job. If this assumption be indulged in certain cases, it must not be overlooked that in others, the employee submits to the domination of organized unions under compulsion of the fear that he may otherwise lose his life. Both assumptions are susceptible of proof if regard be had to the history of recent experience but neither should be accepted as of general application.

Much stress is laid in the cases before the courts as well as those before the Labor Board on the idea of collective bargaining. The great variety of expressions in this regard need not be reviewed in detail.

We repeat and emphasize that our objective in the present argument is to direct specific attention to the constitutional rights of employees who may refuse to submit their fortunes to any one of the great established labor unions as well as the reciprocal constitutional rights of the employer in dealing with such employees. In presenting this practical subject we may quote a single sentence from the opinion of Chief Justice Hughes in the Jones & Laughlin case, 301 U. S. 1, as follows:

> "We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum" (p. 41).

In this connection, it may not be out of place to quote the lucid and comprehensive statement in the same opinion set-

ting forth the general scope and intent of the present Labor Act, as follows:

> "We also pointed out that, as conceded by the Government, the injunction against the Company's entering into any contract concerning rules, rates of pay and working conditions except with a chosen representative was 'designed only to prevent collective bargaining with anyone purporting to represent employees' other than the representative they had selected. It was taken 'to prohibit the negotiation of labor contracts generally applicable to employees' in the described unit with any other representative than the one so chosen, 'but not as precluding such individual contracts' as the Company might 'elect to make directly with individual employees.' We think this construction also applies to Sec. 9(a) of the National Labor Relations Act" (pp. 44-45).

The language thus quoted necessarily presupposes that an agent for collective bargaining has been designated or certified by the Board. It cannot and does not purport to cover the rights of employees who, in the exercise of their constitutional rights, have declined to be bound by any action taken by such designated agent and the employer.

The same freedom of action must be accorded what for brevity we may term the dissenting employee as is accorded those who have submitted their bargaining rights to the domination of an established union. We here re-assert that the individual constitutional rights of the "independents" may be exercised in such manner as they may voluntarily determine, best calculated to subserve their interests. Also, that the right last mentioned includes that of dealing through their own chosen representatives as well as indi-

vidually and that any other interpretation of the Labor Act's terms is unconstitutional for reasons already stated.

It is respectfully submitted that for reasons stated in this brief, if the case is not disposed of as presenting a purely moot issue, the decree and order of the Circuit Court of Appeals should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 413.—October Term, 1937.

National Labor Relations Board, Petitioner, *vs.* Pennsylvania Greyhound Lines, Inc., and Greyhound Management Company. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[February 28, 1938.]

Mr. Justice Stone delivered the opinion of the Court.

The main question for decision is whether, upon a finding that an employer has created and fostered a labor organization of employees and dominated its administration in violation of § 8 (1), (2) of the National Labor Relations Act of July 5, 1935 (c. 372, 49 Stat. 449, 29 U. S. C., § 151, *et seq.*), the National Labor Relations Board, in addition to ordering the employer to cease these practices, can require him to withdraw all recognition of the organization as the representative of its employees and to post notices informing them of such withdrawal.

Respondent Pennsylvania Greyhound Lines, Inc., is a corporation operating a passenger motor bus system between the Atlantic Coast and Chicago and St. Louis. Respondent Greyhound Management Company, an affiliate of the Pennsylvania Company, performs various services relating to employee personnel of the latter and its affiliated corporations. Together, respondents act as employers of those employees working at the Pittsburgh Garage of the Pennsylvania Company and together actively deal with labor relations of those employees.

Upon charges filed by Local Division No. 1063, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, a labor organization, the Board issued its complaint, as permitted by § 10 (b) of the Act, charging that respondents had engaged in specified unfair labor practices affecting interstate commerce, in violation of § 8. After notice to respondents, and hearing, the Board found that they had engaged in unfair labor practices

by interfering with, restraining, and coercing employees in the exercise of their rights, guaranteed by § 7, in that they had dominated and interfered with the formation and administration of a labor organization of their employees, Employees Association of the Pennsylvania Greyhound Lines, Inc., and had contributed financial and other support to it in violation of § 8 (1), (2).

The Board ordered that respondents cease each of the specified unfair labor practices. It further ordered that they withdraw recognition from the Employees Association as employee representative authorized to deal with respondents concerning grievances, terms of employment, and labor disputes, and that they post conspicuous notices in all the places of business where such employees are engaged, stating that the "Association is so disestablished and that respondents will refrain from any such recognition thereof". 1 N. L. R. B. 1.

Upon the Board's petition under § 10 (e) to enforce the order, heard April 1, 1936, the Court of Appeals for the Third Circuit gave judgment after a delay of one year and two months, during which there were three postponements and two reargruments. It struck from the order all provisions requiring the withdrawal by respondents of recognition of the Employees Association and publication of notice of withdrawal, and directed that in other respects the Board's order be enforced. 91 F. (2d) 178. The court thought that the Board was without authority to order the employers to withhold recognition from the Association, without notice to it and opportunity for a hearing, and without an election by the employees to choose a labor organization to represent them. We granted certiorari, — U. S. —, the questions involved being of importance in the administration of the National Labor Relations Act.

Respondents do not assail the Board's findings of fact as without support in the evidence, and the principal questions for decision are of law, whether in the circumstances disclosed by the findings the Board acted within the authority conferred upon it by §§ 7, 8 and 10 of the Act. Section 7 provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Section 8 declares:

"It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

"(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: . . ."

By § 10 (b) the Board is given authority to hear complaints of unfair labor practices upon evidence; and § 10 (c)[1] directs that when the Board finds that any person has engaged in unfair labor practices it "shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . . as will effectuate the policies of this Act. . . ."

Notwithstanding the mandatory form of § 10 (c), its provisions in substance leave to the Board some scope for the exercise of judgment and discretion in determining, upon the basis of the findings, whether the case is one requiring an affirmative order, and in choosing the particular affirmative relief to be ordered. Hence, upon the challenge of the affirmative part of an order of the Board, we look to the Act itself, read in the light of its history, to ascertain its policy, and to the facts which the Board has found, to see whether they afford a basis for its judgment that the action ordered is an appropriate means of carrying out that policy.

The history of the Act and its language show that its ruling purpose was to protect interstate commerce by securing to employees the rights established by § 7 to organize, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for that and other purposes. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 23, 33. This appears both from the formal declaration of policy in § 1 of the Act, *National Labor Relations Board* v. *Jones & Laugh-*

[1] "Sec. 10 (c). The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . ."

lin Steel Corp., supra, 22-24, and from § 7, in itself a declaration of the policy which, in conjunction with § 10 (c), it adopts as the controlling guide to administrative action.

Before enactment of the National Labor Relations Act this Court had recognized that the maintenance of a "company union", dominated by the employer, may be a ready and effective means of obstructing self-organization of employees and their choice of their own representatives for the purpose of collective bargaining. Section 2 (3) of the Railway Labor Act of 1926, had provided that representatives, for the purposes of the Act, should be designated by employer and employees "without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other". We had held that in enforcing this provision, employer recognition of a company union might be enjoined and the union "disestablished", as an appropriate means of preventing interference with the rights secured to employees by the statute. *Texas & N. O. R. Co.* v. *Brotherhood of Railway & Steamship Clerks,* 281 U. S. 548, 560; see also *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, 542 *et seq.*

Congress, in enacting the National Labor Relations Act, had in mind the experience in the administration of the Railway Labor Act, and declared that the former was "an amplification and further clarification of the principles" of the latter. Report of the House Committee on Labor, H. R. 1147, 74th Cong., 1st Sess., p. 3. It had before it the *Railway Clerks* case which had emphasized the importance of union recognition in securing collective bargaining, Report of the Senate Committee on Education and Labor, S. Rep. 573, 74th Cong., 1st Sess., p. 17, and there were then available data showing that once an employer has conferred recognition on a particular organization it has a marked advantage over any other in securing the adherence of employees, and hence in preventing the recognition of any other.[2] The Na-

[2] On the significance of recognition in collective bargaining see Commons and Andrews, *Principles of Labor Legislation* (Harper & Bros., 4th Ed., 1936), p. 372; Catlin, *The Labor Problem* (Harper & Bros., 1935), pp. 431, 522; Rufener, *Principles of Economics* (Houghton-Mifflin Co., 1927), p. 399; Twentieth Century Fund, Inc., *Labor and the Government* (1935), p. 47; Yoder, *Labor Economics and Labor Problems* (1933), p. 443; U. S. Department of Labor, Bureau of Labor Statistics, *Characteristics of Company Unions,* Bulletin No. 634, Chs. VII, XXII.

tional Labor Relations Act continued and amplified the policy of the Railway Labor Act by its declaration in § 7, and by providing generally in § 8 that any interferences in the exercise of the rights guaranteed by § 7 and specifically the domination or interference with the formation or administration of any labor organization were unfair labor practices. To secure to employees the benefits of self-organization and collective bargaining through representatives of the employees' own choosing, the Board was authorized by § 10 (c) to order the abandonment of unfair labor practices and to take affirmative action which would carry out the policy of the Act.

In recommending the adoption of this latter provision the Senate Committee called attention to the decree which, in the *Railway Clerks* case, had compelled the employer to "disestablish its company union as representative of its employees". Report of the Senate Committee on Education and Labor, *supra*. The report of the House Committee on Labor on this feature of the Act, after pointing out that collective bargaining is "a sham when the employer sits on both sides of the table by supporting a particular organization with which he deals", declared: "The orders will of course be adapted to the need of the individual case; they may include such matters as refraining from collective bargaining with a minority group, recognition of the agency chosen by the majority for the purposes of collective bargaining, posting of appropriate bulletins, refraining from bargaining with an organization corrupted by unfair labor practices." Report of the House Committee on Labor, *supra*, pp. 18, 24.

It is plain that the challenged provisions of the present order are of a kind contemplated by Congress in the enactment of § 10 (c) and are within its terms. There remains the question whether the findings adequately support them.

The Board's subsidiary findings of fact fully sustain its conclusion that respondents had engaged in unfair labor practices, by active participation in the organization and administration of the Employees Association, which they dominated throughout its history, and to whose financial support they had contributed; and that they had interfered with, restrained and coerced their employees in the exercise of the rights confirmed by § 7 to form for themselves a labor organization and to bargain collectively through representatives of their own choosing.

It is unnecessary to repeat in full detail the facts disclosed by the findings. They show that before the enactment of the National Labor Relations Act, respondents, whose employees were unorganized, initiated a project for their organization under company domination. In the course of its execution officers or other representatives of respondent were active in promoting the plan, in urging employees to join, in the preparation of the details of organization, including the by-laws, in presiding over organization meetings, and in selecting employee representatives of the organization.

The by-laws and regulations provided that all motorbus operators, maintenance men and clerical employees, after three months service, automatically became members of the Association, and that only employees were eligible to act as employee representatives. No provisions were made for meetings of members, nor was a procedure established whereby employees might instruct their representatives, or whereby those representatives might disseminate information or reports. Grievances were to be taken up with regional committees with final review by a Joint Reviewing Committee made up of an equal number of regional chairmen and of management representatives, but review in those cases could not be secured unless there was a joint submission of the controversy by employee and management representatives.

Change of the by-laws without employer consent was precluded by a provision that amendment should be only on a two-thirds vote of the Joint Reviewing Committee, composed of equal numbers of employer and employee representatives. Employees paid no dues, all the Association expenses being borne by the management.

Although the Association was in terms created as a bargaining agency for the purpose of "providing adequate representation" for respondents' employees by "securing for them satisfactory adjustment of all controversial matters", it has functioned only to settle individual grievances. On the one recorded occasion when the employees sought a wage increase, the company representatives prevented its consideration by refusing to join in the submission to the Joint Reviewing Committee.

In May, 1935, shortly before the passage of the Act, certain of respondents' Pittsburgh employees organized a local union, Local Division No. 1063 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, affiliated with

the American Federation of Labor, and continued to hold meetings of the organization after the passage of the Act on July 5, 1935. Before and after that date, respondents' officers were active in warning employees against joining the union and in threatening them with discharge if they should join and in keeping the union meetings under surveillance.

Section 10 (e) declares that the Board's findings of fact "if supported by evidence, shall be conclusive." Whether the continued recognition of the Employees Association by respondents would in itself be a continuing obstacle to the exercise of the employees' right of self-organization and to bargain collectively through representatives of their own choosing, is an inference of fact to be drawn by the Board from the evidence reviewed in its subsidiary findings. See *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297.

We may assume that there are situations in which the Board would not be warranted in concluding that there was any occasion for withdrawal of employer recognition of an existing union before an election by employees under § 9 (c), even though it had ordered the employer to cease unfair labor practices. But here respondents, by unfair labor practices, have succeeded in establishing a company union so organized that it is incapable of functioning as a bargaining representative of employees. With no procedure for meetings of members or for instructing employee representatives, and with no power to bring grievances before the Joint Reviewing Committee without employer consent, the Association could not without amendment of its by-laws be used as a means of the collective bargaining contemplated by § 7; and amendment could not be had without the employer's approval.

In view of all the circumstances the Board could have thought that continued recognition of the Association would serve as a means of thwarting the policy of collective bargaining by enabling the employer to induce adherence of employees to the Association in the mistaken belief that it was truly representative and afforded an agency for collective bargaining, and thus to prevent self-organization. The inferences to be drawn were for the Board and not the courts. *Swayne & Hoyt, Ltd.* v. *United States, supra.* There was ample basis for its conclusion that withdrawal of recognition of the Association by respondents, accompanied by suitable publicity, was an appropriate way to give effect to the policy of the Act.

As the order did not run against the Association it is not entitled to notice and hearing. Its presence was not necessary in order to enable the Board to determine whether respondents had violated the statute or to make an appropriate order against them. See *General Investment Co.* v. *Lake Shore & M. S. R. Co.*, 260 U. S. 261, 285-286.

Respondents suggest that the case has become moot by reason of the fact that since the Board made its order it has certified the Brotherhood of Railroad Trainmen as representative of the motor-bus drivers of the Pennsylvania company for purposes of collective bargaining and that in a pending proceeding under § 9 (c) for the certification of a representative of the other Pittsburgh employees, to which the Employees' Association is not a party, the Pennsylvania company and Local Division No. 1063, who are parties, have made no objection to the proposed certification. But an order of the character made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made.

We have considered but find it unnecessary to comment upon other objections to the order, of less moment.

Reversed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.